

Appeal from a decision of Administrative Law Judge Harvey C. Sweitzer granting a motion to dismiss an application for review and temporary relief. Cessation Order No. 85-1-392-1 and Notice of Violation No. 85-1-392-4(1-6).

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Cessation Orders: Generally -- Surface Mining Control and Reclamation Act of 1977: Environmental Harm: Generally -- Surface Mining Control and Reclamation Act of 1977: Federal Program: Permits -- Surface Mining Control and Reclamation Act of 1977: Permits: Temporary Relief -- Surface Mining Control and Reclamation Act of 1977: Temporary Relief: Significant, Imminent Environmental Harm

Under regulation 30 CFR 843.11(a)(2), the conduct of surface mining operations without a valid permit constitutes a condition or practice which causes or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources. Issuance of a cessation order is required by regulation 30 CFR 843.11(a)(1) when a condition or practice exists which causes or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources.

2. Surface Mining Control and Reclamation Act of 1977: Initial Regulatory Program: Generally -- Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Generally

Sec. 521(a)(3) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1271(a)(3) (1982), authorizes the Secretary to issue a notice of violation to a permittee who is in violation of any requirement of the Act or any permit condition required by the Act.

3. Surface Mining Control and Reclamation Act of 1977: Inspections: Generally

OSMRE inspectors are not required by sec. 517(b)(3) of the Act to present their credentials prior to inspecting an inactive minesite at which no one associated with the mining operation is present.

4. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Generally -- Surface Mining Control and Reclamation Act of 1977: Hearings: Generally -- Surface Mining Control and Reclamation Act of 1977: Permits: Hearings

Where the pleadings reveal that no material issue of fact is in dispute, no hearing is required to be held by the Administrative Law Judge, notwithstanding the terms of 30 U.S.C. § 1275 (1982), providing an opportunity for a public hearing to a permittee seeking review of a cessation order or notice of violation.

5. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Generally -- Surface Mining Control and Reclamation Act of 1977: Civil Penalties: Generally -- Surface Mining Control and Reclamation Act of 1977: Hearings: Generally

A person filing an application for review of a cessation order under 43 CFR 4.1160 shall file such application within 30 days of receipt of the order. A petition for review of a proposed assessment of a civil penalty must be filed within 30 days of receipt of the proposed assessment.

APPEARANCES: James A. Lanza, Esq., Bellevue, Washington, for appellant; Glenn F. Tiedt, Esq., Office of the Regional Solicitor, Denver, Colorado, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Firchau Mining, Inc. (Firchau), has appealed from an order of Administrative Law Judge Harvey C. Sweitzer, dated November 8, 1985, granting a motion to dismiss its application for temporary relief and for review of cessation order (CO) No. 85-1-392-1 and notice of violation (NOV) No. 85-1-392-4(1-6). The motion to dismiss was filed by the Office of Surface Mining Reclamation and Enforcement (OSMRE) pursuant to 43 CFR 4.1169.

CO No. 85-1-392-1 and NOV No. 85-1-392-4(1-6) were issued 1/ following an inspection by OSMRE on July 9 and 10, 1985, under the authority of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1267(b)(3)

1/ Item 18 of both the CO and NOV provides space for entry of the date of service of these documents. No entry has been made in item 18 of the file copies of these documents. Judge Sweitzer noted during his prehearing

(1982). CO No. 85-1-392-1 charged appellant with "mining off the permit area" and ordered appellant to immediately cease such operations. NOV No. 85-1-392-4(1-6) charged appellant with six violations 2/ of the general performance standards found at 30 CFR Part 715. The NOV was subsequently modified to extend the time for abating the violations there alleged, and on August 27, 1985, both the NOV and CO were modified to exclude any requirement that appellant take remedial measures for a disturbed area located in sec. 30, T. 39 N., R. 7 E., Willamette Meridian.

On August 7, 1985, Firchau filed its application for temporary relief and review pursuant to 30 U.S.C. § 1275 (1982). This application was amended by a pleading filed on September 20, 1985, which set forth in greater detail appellant's objections to OSMRE's actions. In this amended application, appellant stated that the Washington State Department of National Resources (DNR) had issued to Firchau operating permit No. 11570 on December 13, 1976. 3/ Whatcom County, the situs of appellant's surface coal operation, thereafter granted to appellant on June 30, 1978, a conditional use permit to conduct exploratory operations for anthracite coal in secs. 29 and 30, T. 39 N.,

fn. 1 (continued)

conference on Sept. 25, 1985, that OSMRE's copy of these documents shows July 19, 1985, entered in item 18.

Item 15 indicates that Bud Berry was served with the CO and NOV. Appellant contends that these documents should have been served on either Jack Lawrence or Gary Graham, both representatives of appellant. Berry has never been an employee of Firchau Mining, Inc., appellant states. The record is clear, however, that Lawrence, as manager of Firchau, filed on Aug. 7, 1985, appellant's application for temporary relief and review. On Aug. 12, 1985, appellant filed with the Office of Hearings and Appeals a copy of both the CO and NOV in accordance with 43 CFR 4.1164(c). It is plain, therefore, that appellant had actual notice of the CO and NOV by Aug. 12, 1985, at the latest. No violation of the service requirements set forth at 30 CFR 947.843.14 is evident from the record. We conclude that proper service of the CO and NOV were made. See Union Oil Company of California, 98 IBLA 37, 45 (1987), and Nabesna Native Corp. (On Reconsideration), 83 IBLA 82, 83 (1984).

2/ These violations were:

- "(1) Failure to restore all disturbed areas in violation of 30 CFR 715.13(a)(1);
- "(2) Failure to transport, backfill, compact, and grade all spoil material to eliminate all highwalls, spoil piles, and depressions in violation of 30 CFR 715.14;
- "(3) Failure to cover all exposed coal seams and any acid-forming, toxic-forming combustible materials mixed in with spoil with a minimum of 4 feet of nontoxic and noncombustible material in violation of 30 CFR 715.14(j)(1);
- "(4) Failure to salvage topsoil prior to any surface disturbance in violation of 30 CFR 715.16(a);
- "(5) Failure to pass all surface drainage from the disturbed bed area through a sedimentation pond in violation of 30 CFR 715.17(a); and
- "(6) Failure to revegetate the disturbed area in violation of 30 CFR 715.20(a)(2)."

3/ This permit described 120 acres in sec. 30, T. 39 N., R. 7 E.

R. 7 E. Id. Work commenced in 1978, appellant stated, and approximately 20,000 tons of anthracite coal were removed from the site during the next 2 years. During this period, appellant and Albert J. Firchau became involved in litigation, and since 1980, only 2,000 tons have been mined. Id. Two-year permit extensions were granted by DNR and Whatcom County in 1980 and 1982, appellant noted, and a new permit is expected from the county at any time. No mining activity has taken place either on or off the permit area since June 30, 1984. Id.

Appellant argues that OSMRE wrongly issued CO No. 85-1-392-1 because OSMRE lacked jurisdiction to enforce violations of DNR permit No. 11570 and because OSMRE's inspection of July 9, 1985, violated 30 U.S.C. § 1267 (1982). No mining having occurred anywhere since June 30, 1984, a CO was improper, appellant contends, and moreover, any activity that might be construed as mining would fall into the exceptions noted in 30 CFR 843.11(a)(2)(i) and 30 CFR 843.11(a)(2)(ii).

Appellant restates its arguments based on jurisdiction and the July 9 inspection in assigning error to OSMRE's issuance of NOV No. 85-1-392-4(1-6). In addition, appellant states that its original work remains incomplete as a result of litigation and its new permit application contemplates a higher use of the land.

The focus of OSMRE's CO and NOV is appellant's operation in sec. 29, T. 39 N., R. 7 E. Because mining in sec. 30 predated enactment of SMCRA on August 3, 1977, OSMRE modified the CO and NOV to exclude sec. 30 from the terms thereof. Appellant's obligations immediately following the enactment of SMCRA are set forth at section 502 of the Act and 30 CFR Subchapter B.

Section 502(a) of SMCRA, 30 U.S.C. § 1252 (1982), requires the following: "No person shall open or develop any new or previously mined or abandoned site for surface coal mining operations on lands on which such operations are regulated by a State unless such person has obtained a permit from the State's regulatory authority." The record shows that no state permit has ever been obtained by appellant to authorize mining in sec. 29. Appellant's commencement of mining there in 1978 was a violation of 30 U.S.C. § 1252 (1982) because the State of Washington did, in fact, regulate mining on that section. Indeed, the record shows that on three occasions DNR notified appellant of the need to include sec. 29 in appellant's operating permit No. 11570.

When on May 16, 1983, a Federal program for the State of Washington became effective, 48 FR 22291 (May 18, 1983), the terms of section 506(a) of SMCRA, 30 U.S.C. § 1256(a) (1982), became directly applicable. That section states in part:

[N]o later than eight months from the date on which the Secretary has promulgated a Federal program for a State not having a State program pursuant to section 504 of this Act, no person shall engage in or carry out on lands within a State any surface coal mining operations unless such person has first obtained a permit issued * * * by the Secretary pursuant to a Federal program.

Thus as of mid-January 1984, appellant was required to have a permit issued by OSMRE in order to operate in sec. 29. 4/ The record shows that at no time has appellant received a permit from OSMRE or the Secretary.

[1] In issuing CO No. 85-1-392-1, OSMRE relied on section 521(a)(2) of SMCRA, 30 U.S.C. § 1271(a)(2) (1982), and 30 CFR 843.11(a)(2). 5/ Section 521(a)(2) states in part:

(2) When, on the basis of any Federal inspection, the Secretary or his authorized representative determines that any condition or practices exist, or that any permittee is in violation of any requirement of this Act or any permit condition required by this Act, which condition, practice, or violation * * * is causing, or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources, the Secretary or his authorized representative shall immediately order a cessation of surface coal mining and reclamation operations or the portion thereof relevant to the condition, practice, or violation. [Emphasis added.]

By the terms of 30 CFR 843.11(a)(2), surface coal operations conducted without a valid surface coal mining permit constitute a condition or practice which causes or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources. Mid-Mountain Mining, Inc. v. Office of Surface Mining Reclamation and Enforcement, 92 IBLA 4 (1986).

Two exceptions to the provisions of 30 CFR 843.11(a)(2) are set forth in the regulation, and appellant contends that each is applicable to its operations. These exceptions excuse mining without a valid permit where such mining operations:

(i) Are an integral, uninterrupted extension of previously permitted operations, and the person conducting such operations has filed a timely and complete application for a permit to conduct such operations; or

(ii) Were conducted lawfully without a permit under the interim regulatory program because no permit has been required for such operations by the State in which the operations were conducted.

The record reveals, however, that appellant qualifies for neither exception. Assuming, arguendo, that appellant's operations in sec. 29 are an integral, uninterrupted extension of previously permitted operations in sec. 30, we find that appellant cannot satisfy 30 CFR 843.11(a)(2)(i) because it has never filed an application for a permit to operate in sec. 29 with either OSMRE or DNR, the only two authorities recognized by SMCRA to issue such permits. With respect to 30 CFR 843.11(a)(2)(ii), appellant never operated lawfully on sec.

4/ Until such permit issued, 30 CFR 710.11(a)(3)(iii) also required appellant to comply with the regulations at 30 CFR 710.11.

5/ Part 843 of 30 CFR has been incorporated in the Washington Federal Program at 30 CFR 947.843.

29 without a permit during the interim regulatory program because, as noted above, the State of Washington at all relevant times required a permit. As such, appellant cannot qualify for the second exception.

We hold that OSMRE had clear jurisdiction to issue CO No. 85-1-392-1 in response to appellant's failure to satisfy sections 502 and 506 of SMCRA, *supra*. Appellant's unsupported argument to the contrary was properly rejected by the Administrative Law Judge.

[2] Section 521(a)(3) addresses appellant's argument that OSMRE lacked jurisdiction to enforce DNR permit violations by use of NOV No. 85-1-392-4(1-6). That section (30 U.S.C. § 1271(a)(3) (1982)) states in part:

When, on the basis of a Federal inspection which is carried out during the enforcement of a Federal program or a * * * Federal inspection pursuant to section 502, * * * the Secretary or his authorized representative determines that any permittee is in violation of any requirement of this Act * * * but such violation does not create an imminent danger to the health or safety of the public, or cannot be reasonably expected to cause significant, imminent environmental harm to land, air, or water resources, the Secretary or authorized representative shall issue a notice to the permittee or his agent fixing a reasonable time but not more than ninety days for the abatement of the violation and providing opportunity for public hearing.

As set forth at note 2, OSMRE charged appellant with six violations of 30 CFR Part 715, not, as appellant states, with violations of its DNR permit. Each regulation cited by OSMRE replicates a statutory requirement 6/ of SMCRA. The above-quoted passage from section 521(a)(3) confers upon the Secretary the authority to address violations of the Act by means of an NOV. Contrary to appellant's argument, we hold that OSMRE had clear jurisdiction to issue NOV No. 85-1-392-4(1-6).

In attacking both the CO and NOV issued by OSMRE, appellant contends that the agency's inspection on July 9, 1985, violated 30 U.S.C. § 1267 (1982). Subsection (b)(3) of that statute provides that "the authorized representative of the regulatory authority, without advance notice and upon presentation of appropriate credentials (A) shall have the right of entry to, upon, or through any surface coal mining and reclamation operations." (Emphasis added.) OSMRE is said to have violated this provision by the failure of its inspector to present his credentials at the time of inspection.

OSMRE agrees with appellant that its inspector did not present his credentials, but states that he did not because there was no one at the minesite to whom the inspector's credentials could be presented. Appellant

6/ These statutory requirements are set forth in the following sections of the Act: 515(b)(2); 515(b)(3); 515(b)(5); 515(b)(10); and 515(b)(19). Section 502(c) of the Act, 30 U.S.C. § 1252(c) (1982), required appellant to satisfy each of the above provisions "on and after nine months from the date of this Act." The counterparts of these provisions appear in the Washington Federal Program (30 CFR Part 947) at the following subsections: 947.816.133; 947.816.102(a); 947.816.102(f); 947.816.22; 947.816.46(b); and 947.816.111.

acknowledged in a prehearing conference ^{7/} on September 25, 1985, that there has not been anyone on the minesite for years (Tr. 19), but contended that OSMRE should have checked in with an individual named Gary Graham prior to its inspection. Graham maintains an office and restaurant on a road that anyone entering the minesite would have to use. Id. The files of DNR, Whatcom County, and OSMRE should all reflect, appellant contends, that a person entering the minesite should check in with Graham.

[3] We find no violation of 30 U.S.C. § 1267 (1982). In William M. Johnson, 3 IBSMA 377, 88 I.D. 1112 (1981), the Interior Board of Surface Mining and Reclamation Appeals stated that the presentation-of-credentials requirement in 30 U.S.C. § 1267 (1982) "derives from the interest of mine operators in being aware of the presence of non-employees at a minesite, to facilitate the safe and orderly conduct of mining operations." 3 IBSMA at 377, 88 I.D. at 1114. In Johnson, as in this case, there was no mining activity at the time the OSMRE inspector entered the site. Because the Johnson appellant could allege no interest protected by the regulation that had been transgressed by the inspector, the Board found no error in the actions of the inspector. A similar rationale applies here, and we find that appellant has similarly failed to identify any interest transgressed by the inspector's action. Accordingly, we hold that appellant has failed to show error in the inspector's failure to present credentials at the time of the July 9, 1985, inspection. ^{8/}

[4] Our findings above indicate that appellant's application for review was properly dismissed by the Administrative Law Judge. Regulation 43 CFR 4.1171 places the ultimate burden of persuasion on appellant, and this burden, we hold, has not been carried by Firchau on any issue. We hold further that dismissal was proper without a hearing, because no material issue of fact is disputed by the parties. In so holding, we acknowledge that 30 U.S.C. § 1275 (1982) confers upon a "permittee" the right to obtain Secretarial review of a CO or NOV, which review shall provide an opportunity for a public hearing. Where, as here, however, the pleadings disclose no material issue of fact in dispute, a hearing would be a useless gesture. United States v. Consolidated Mines & Smelting Co., 455 F.2d 432, 453 (9th Cir. 1971). Our holding is further supported by the regulations at 43 CFR 4.1169, authorizing the filing of a motion to dismiss where an application for review fails to state a claim upon which administrative relief may be granted.

A party seeking temporary relief from an enforcement action must show, inter alia, a substantial likelihood that the findings of the Secretary will be favorable to the applicant. 30 U.S.C. § 1275(c)(2)(1982); Shamrock Coal Co. v. Office of Surface Mining Reclamation and Enforcement, 81 IBLA 374 (1984). For the reasons set forth above, dismissal of this application was proper.

^{7/} This conference was held one day after the parties and the Administrative Law Judge viewed the area that is the subject of this dispute.

^{8/} See also the preamble to regulation 30 CFR 842.13 where it is stated that the Act and its regulations clearly contemplate circumstances under which the normal display of credentials prior to inspection might necessarily be postponed. 47 FR 35620, 35629 (Aug. 16, 1982).

Appellant's final pleading reveals that OSMRE issued to appellant on October 22, 1985, CO No. 85-1-392-3(6) charging that appellant had failed to abate the violations described in NOV No. 85-1-392-4(1-6). ^{9/} Thereafter on December 6, 1985, ^{10/} OSMRE notified appellant of a proposed assessment of \$ 135,000 in civil penalties pursuant to section 518(h) of the Act, 30 U.S.C. § 1268(h) (1982). A final order stating that such sum was due and payable was subsequently issued by the agency. Appellant contends that OSMRE is being "unduly technical" in maintaining that it can proceed to collection under CO No. 85-1-392-3(6) when the very same activities are pending before the Board in its review of NOV No. 85-1-392-4(1-6). It asks, therefore, that we now vacate the final order or stay its execution. Alternatively, appellant asks that it be granted leave to amend its initial pleadings to include CO No. 85-1-392-3(6).

OSMRE has responded to appellant's request by pointing out that appellant failed to file an application for review of CO No. 85-1-392-3(6) and similarly failed to request an assessment conference or file a petition for review of the civil penalty. It notes further that appellant neglected to remit the proposed assessment (\$ 135,000) as required by 43 CFR 4.1152 to obtain review.

[5] Appellant's attempt to obtain review of CO No. 85-1-392-3(6) and the notice of proposed assessment is tardy. Regulation 43 CFR 4.1170(c) requires appellant to file a separate application for review of this related CO. Any such application had to be filed within 30 days of the CO's receipt on October 22, 1985. 43 CFR 4.1162. Any petition for review of the proposed assessment had to be filed within 30 days of its receipt on December 6, 1985, and be accompanied by full payment of the proposed assessment. 43 CFR 4.1151(a) and 43 CFR 4.1152(b); Tri Coal Co. v. Office of Surface Mining Reclamation and Enforcement, 85 IBLA 146, 148 (1985); C & K Coal Co. v. OSM, 1 IBSMA 118, 86 I.D. 221 (1979). Appellant's final pleading of March 11, 1986, accomplishes neither of these goals. Accordingly, we hereby deny appellant's request that we vacate the final order, stay its execution, or grant leave to amend its initial pleadings.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Administrative Law Judge is affirmed.

Franklin D. Arness
Administrative Judge

We concur:

Gail M. Frazier
Administrative Judge

R. W. Mullen
Administrative Judge

^{9/} Regulation 43 CFR 4.1116 provides that except where temporary relief is granted, an NOV or CO issued under the Act shall remain in effect during the pendency of review before an Administrative Law Judge or the Board.

^{10/} This date appears in the final order, infra; no proof of service of the notice of proposed assessment is in the record.

